

**CERTIFIED FOR PUBLICATION**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ALEXIS SARTI,

Plaintiff and Appellant,

v.

SALT CREEK LTD.,

Defendant and Respondent.

G037818

(Super. Ct. No. 05CC08588)

ORDER DENYING PETITION FOR  
REHEARING AND MODIFYING  
OPINION; NO CHANGE IN JUDGMENT

The petition for rehearing is DENIED.

The opinion, filed October 27, 2008, is hereby modified as follows:

(1) On page 20 of the slip opinion, in the first sentence of the first complete paragraph, after the words “without authority,” insert the following new footnote 11:

11. To be sure, the words “probable cause” had appeared as part of a quotation in *Dougherty* from an earlier Massachusetts opinion, *Monahan v. Economy Grocery Stores Corp.* (1933) 282 Mass. 548, 550 [“The plaintiff was not bound to exclude every other possible cause for his illness, but he was required to show that the probable cause was the unwholesomeness of the corn.”]. But the *Dougherty* court’s point in using the quotation was to support the idea that the plaintiff did *not* have to exclude all

other causes. Hence, the quotation was preceded, in *Dougherty*, by (1) a sentence recognizing that the plaintiff had the burden of proof (“Of course, the burden was on the plaintiff to show by a preponderance of the evidence that the hay which he had purchased from the defendant contained poison which killed the cows.”) followed by (2) a contrasting sentence rejecting the idea that the plaintiff had to exclude all alternative causes (“But it was not necessary for the plaintiff to furnish evidence which absolutely precluded the possibility of the cattle procuring some other poisonous food.”). Having made its point rejecting the idea that plaintiff had to “preclude[] the possibility” of alternative sources of poisoning, the *Dougherty* court supported its rejection with a passage from the *Monahan* decision, which included the words, “The plaintiff was not bound to exclude every other possible cause . . . .” The *Monahan* court’s use of the phrase “probable cause” was not the point of the passage. (See *Dougherty, supra*, 74 Cal.App.2d at p. 135.) And, for its part, the *Minder* court wisely did not cite *Dougherty* decision for a heightened “probable cause” standard because, ironically and in context, *Dougherty*’s use of a quote using the phrase was actually contrary to *Minder*’s apparent preference for a must-exclude-all-other-causes rule.

(2) Renumber all remaining footnotes accordingly.

These modifications do not affect the judgment.

SILLS, P. J.

WE CONCUR:

RYLAARSDAM, J.

MOORE, J.